B-245856.7, August 11, 1992

Appropriations/Financial Management

Appropriation Availability
■ Purpose availability
■■ Fiscal-year appropriation
■■■ Overobligation

Appropriations/Financial Management

Obligation
■ Overobligation
■■ Reports
■■■ Closed accounts

Agencies generally are not authorized to pay overobligations of expired or closed accounts from current appropriations. 31 U.S.C. §§ 1341(a), 1502(a). Instead, overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations However, until and unless Congress takes one of these actions, a deficiency exists in the account

Appropriations/Financial Management

Obligation
■ Overobligation
■■ Records
■■■ Criminal law matters

Knowing and willful failure to record overobligations in an account or recording overobligations in an improper account in order to conceal a criminal violation of the Antideficiency Act is a criminal offense under provisions of Title 18, U.S.C.

Matter of: The Honorable Andy Ireland, House of Representatives

This responds to your letter of May 20, 1992, raising two issues for our consideration. The first issue stems from a Bureau of National Affairs (BNA) article that suggests that our Office would approve the use of current funds to pay overobligations in expired accounts, a proposition which you understandably find disturbing. The second issue involves your request for our comments on certain proposals made by the Deputy Inspector General, Department of Defense, intended to enhance enforcement of the Antideficiency Act.

With respect to the first issue, a prominent purpose of the 1990 reforms to the account closing provisions in 31 U.S.C. §§ 1551-1558 was to apply the discipline of the Antideficiency Act, 31 U.S.C. § 1341, and the Bona Fide Needs statute, 31 U.S.C. § 1502, to expired accounts. The Antideficiency Act and the Bona Fide Needs statute are intended to ensure that agencies discipline themselves to stay within congressionally authorized funding limitations and to control the level of obligations and outlays. Indeed, as a consequence of these statutes, and contrary to the suggestion contained in the BNA article, agencies generally are not authorized to pay overobligations of expired or closed accounts from current ap-

propriations. Instead overobligations must be reported to the Congress and the President, and Congress may either make a deficiency appropriation to pay the overobligations or authorize the agency to pay the overobligations out of current appropriations. However, until and unless Congress takes one of these actions, a deficiency exists in the account. Hence, the process of agency reporting overobligations to the Congress and requesting funds to pay the obligations is vital to congressional oversight of how agencies manage their financial resources and is necessary to accomplish the objectives of the Antideficiency Act.

With respect to the second issue, you suggest that there are a large number of overobligated DOD accounts and that the "M" accounts remain an insurance policy against violation of the Antideficiency Act. Noting that the "M" accounts will cease to exist after September 1993, you suggest that DOD will be confronted with massive violations of the Antideficiency Act that it might not report immediately as required by law. Accordingly, you ask for comments on a recommendation made by the Deputy Inspector General for the Department of Defense to improve enforcement of the Antideficiency Act by

—making it a crime for a person to knowingly fail to report a violation of the Antideficiency Act within 30 days of obtaining such knowledge, and

—subjecting a person to administrative discipline for failing to report a violation of the Antideficiency Act within 30 days of gaining such knowledge.

We have no basis for concluding that enactment of these recommendations will improve compliance with the Antideficiency Act. The failure to disclose known violations of the Antideficiency Act is already a felony and can be the object of disciplinary actions. Also, the elimination of the merged surplus authority on December 5, 1990, has eliminated one method for agencies to legally avoid disclosure of overobligations of appropriation accounts with the result that disclosure of overobligations should be more likely in the future.

The enclosed analysis discusses these matters in detail and we trust it responds to your concerns.

Enclosure

Analysis of Agency Authority to Pay Overobligations in Expired Accounts and Comments on DOD Deputy IG's Proposal to Amend the Antideficiency Act

This enclosure provides our analysis of an agency's authority to charge overobligations in expired and closed accounts to current appropriations. It also discusses a proposal to amend the Antideficiency Act to authorize criminal and administrative penalties for failure to report violations of the Antideficiency Act.

Payment of Overobligations in Uncanceled Expired Accounts

Background

A recent article in the Daily Report for Executives (BNA), A-4 - A-6 (April 28, 1992), suggests that this Office would authorize payment of overobligations in expired accounts from current appropriations. The article points out that on June 13, 1991, DOD issued guidance to implement the new account closing procedure contained in section 1405 of Pub. L. No. 101-510, 104 Stat. 1675 (1990). The guidance authorized the charging of all within-scope contract changes to current year funds. However, following an inquiry from this Office regarding the legality of such guidance, DOD rescinded the June 13 guidance on April 20, 1992, and returned to the practice, in effect prior to the 1990 amendments, of charging within-scope contract changes to the appropriation initially obligated by the contract. The article points out that following DOD's reinstatement of its prior practice, one issue remained unresolved, namely, the funding of overobligations in uncanceled expired appropriation accounts.

The article suggests two possible solutions to the problem: (1) obtain from Congress a deficiency appropriation for the expired account, or (2) charge current year appropriations, as the 1990 amendments authorize for canceled accounts. The article relies on sources who suggest that although the account closing legislation is silent on this matter, the Comptroller General would approve the second solution:

> The Comptroller General has long recognized the responsibility of the government to pay its bills, and has generally authorized the use of available appropriations *so long as there is no prohibition against such use* . . . The reasoning is that the government owes the money, and when the expired account is bankrupt the need to pay thus becomes a current year need. [Emphasis added.]

The BNA article correctly points out that available appropriations may be used to pay bills unless otherwise prohibited by law. However, the article fails to mention the two statutory provisions that would prohibit using current funds to pay overobligations in prior year accounts. First, the Antideficiency Act prohibits an officer or employee of the government from (1) making or authorizing an expenditure or obligation in excess of the amount available in an appropriation or fund for the expenditure or obligation or (2) involving the government in a contract or obligation for payment of money before an appropriation is made unless otherwise authorized by law. 31 U.S.C. § 1341(a). *See also* 41 U.S.C. § 11. Second, and complementing the Antideficiency Act, is the Bona Fide Needs statute, 31 U.S.C. § 1502(a). This statute provides that the balance of a fixed period appropriation or fund is available only for the payment of expenses properly incurred during the fixed period or to complete contracts properly made within the fixed period and obligated consistent with the 31 U.S.C. § 1501.

The purpose of 31 U.S.C. § 1502(a) is to restrict the use of fixed period appropriations to expenditures required for the service of the particular period for which they are made. Consistent with section 1502(a), a claim against a fixed period appropriation, when otherwise proper, is chargeable to the appropriation

for the fiscal year in which the liability was incurred. The same rule requires that all liabilities and expenditures attributable to contracts made within the period of availability of a fixed period appropriation remain chargeable to that appropriation. 55 Comp. Gen. 768, at 773 (1976).[1]

When a contract is obligated against a fixed period appropriation and costs chargeable to that appropriation exceed the amount available, 31 U.S.C. § 1502(a), in the absence of any other legal authority, precludes the use of current appropriations to fund the prior year contracts since such transactions constitute neither the payment of expenses properly incurred nor the completion of contracts properly made within the current year. 55 Comp. Gen. at 774. Significantly, the cited decision reflects one instance where the Congress specifically rejected a request by the Army to use current appropriations to fund prior year overobligations because of the Army's failure to comply with the Antideficiency Act's reporting requirement. 55 Comp. Gen. at 770–771.

Thus an overobligation of a prior year appropriation is a reportable violation of the Antideficiency Act. In addition, the Bona Fide Needs statute precludes an agency from charging an overobligation to current appropriations unless the Congress so authorizes. Alternatively, Congress could make a deficiency appropriation to the prior year account to cover the overobligation.

Effect of the 1990 Account Closing Amendments

The 1990 amendments to the account closing law, 31 U.S.C. §§ 1551–1558, as amended by Pub. L. No. 101–510, § 1405(a), 104 Stat. 1675 (1990), did not alter the requirements discussed above. Rather they revitalized the application of the Antideficiency Act and the Bona Fide Needs statute to expired accounts. For example, 31 U.S.C. § 1553(a) provides that an expired account retains its fiscal year identity and remains available for recording, adjusting, and liquidating obligations *properly chargeable* to that account. In addition, 31 U.S.C. § 1554(a) provides that any audit requirement, limitation on obligations, or reporting requirement that is applicable to an appropriation account shall remain applicable to that account after the end of the period of availability for obligation of that account. Finally, 31 U.S.C. § 1553(b) authorizes payment of valid obligations properly chargeable to closed accounts from current appropriations subject to certain limitations.

Our Office has applied these statutory requirements to resolve whether agencies should obligate current or expired appropriations for contract changes occurring after the appropriation initially obligated by the contract expires and therefore is no longer available for incurring new obligations. A contract change which exceeds the general scope of the original contract, commonly referred to as an outside-the-scope change, like any new obligation, is chargeable to funds current at the time the change is made. 37 Comp. Gen. 861 (1958); B-207433, Sept. 16, 1983. *See also*, 61 Comp. Gen. 184 (1981), *aff'd upon reconsideration*, B-202222, Aug. 2, 1983; B-224702, Aug. 5, 1987. In contrast, a contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, is considered an antecedent liability. In other words, the original contract makes the government liable for a price increase under specified conditions and the subsequent contract change makes that liability fixed and certain. Therefore, the liability relates back to the original contract and the price increase to pay the liability is chargeable to the appropriation initially obligated by the contract. 59 Comp. Gen. 518 (1980); 44 Comp. Gen. 399 (1965); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938).

The account closing amendments of 1990 originated in a Senate amendment to the National Defense Act for fiscal year 1991. On the same day that the House of Representatives began consideration of the Conference Report containing the Senate amendments, the House of Representatives adopted H.R. 5645, the Expired Funds Control Act of 1990, containing, insofar as relevant here, almost identical language to the Senate account closing amendments.[2] The House agreed to the Conference Report on the following day.[3]

The report of the House Government Operations Committee accompanying the Expired Funds Control Act of 1990 makes clear that the amendments were intended to be implemented in compliance with the Antideficiency Act and the Bona Fide Needs statute. The Committee Report explains the amendments as follows:

> Section 1553(a) clarifies the availability of expired funds to pay obligations. It restates current law, which permits the use of funds in expired accounts only for obligations properly chargeable to those accounts. Obligations are "properly chargeable" to an expired account when they reflect "bona fide needs" of the period of availability of the expired account (31 U.S.C. § 1502) and meet other requirements set forth in statutes and Comptroller General and court decisions for obligations of appropriated funds, including the Antideficiency Act (31 U.S.C. § 1341 et seq.), requirements for proper recording of obligations, (31 U.S.C. § 1501), and the requirements that appropriated funds be used only for the purposes for which they are appropriated (31 U.S.C. § 1301) . . . .
>
> In order for an obligation to be eligible for liquidation with current funds under amended section 1553(b), it must have been "properly chargeable" to the closed account, both as to purpose and in amount. Subsection 1553(b) is not intended to provide an exception to the Antideficiency Act or to permit an agency to cure an incipient Antideficiency Act violation by charging an overobligation to current funds. This section is meant to provide a mechanism for the liquidation only of obligations that would not have caused a violation of the Antideficiency Act had they been charged to the account to which they would have been chargeable had available balances not been rescinded.
>
> Section 1554(a) makes clear that, unless otherwise specifically provided by statute, audit requirements, limitations on obligations, and reporting requirements that are applicable to any current account also are applicable to that account after the end of its period of availability. In other words, the expiration of an account shall not be deemed to terminate, discontinue, or otherwise diminish any legal restrictions on the use of funds in that account. Unless otherwise provided, the Antideficiency Act (31 U.S.C. §§ 1341 et seq.), the "bona fide needs" rule (31 U.S.C. § 1502), requirements for proper recording of obligations (31 U.S.C. § 1501), and other limitations on the use of appropriated funds set forth in statutes and in Comptroller General and court decisions apply to expired accounts to the same extent they apply to current accounts.[4]

Clearly, the 1990 amendments left unchanged the rule that if adjustments to obligations properly chargeable to an expired account result in overobligating the expired account, the overobligation constitutes a reportable violation of the Antideficiency Act. Further, the law makes no provision for paying overobligations of expired accounts, and our decisions make clear that absent congressional authorization, the overobligations may not be charged to current appropriations. To now hold otherwise would be inconsistent with the legal rationale underlying the Committee's statement that section 1553(b) does not authorize

[2] 136 Cong. Rec. H11904-H11906 (daily ed. October 23, 1990).
[3] 136 Cong. Rec. H13534 (daily ed. October 24, 1990).
[4] H.R. Rep. No. 101-898, 7-8 (1990).

agencies to charge overobligations of closed accounts against current appropriations.

Consequently, agencies must report overobligations of expired accounts to the Congress and, when necessary, request additional funding to cover the overobligation or obtain authority to charge the overobligation to the agencies' current appropriations. In our opinion, this approach provides an incentive to agencies to discipline themselves to stay within funding limitations and to assure the integrity of government financing and accounting.

However, absent congressional authorization, there is no authority for agencies to charge overobligations of expired or closed accounts to current appropriations. Consequently, even though the overobligation may reflect a liability of the government, payment may not be made until the agency receives the requisite authorization from the Congress. Since this may result in a payment delay on which interest penalties may be accruing,[5] the agency should report any violations immediately to Congress for its consideration and action as described above.

DOD Deputy IG's Proposal to Amend the Antideficiency Act

Background

The Antideficiency Act requires that the head of an agency report Antideficiency Act violations (regardless of whether they are knowing and willful or inadvertent) immediately to the President and Congress and include in its report on such violations all relevant facts and a statement of actions taken. 31 U.S.C. §§ 1351 and 1517(b). The law is silent as to what are "relevant facts" and whether the actions taken by the agency must be completed before the report is submitted. The Office of Management and Budget Cir. No. A-34, Revised August 25, 1985, Part III, 32.3, 32.4, specifies what information executive branch agencies are to provide in Antideficiency Act reports.

Your letter states that the Deputy Inspector General for the Department of Defense has recommended that Congress amend the Antideficiency Act to subject an officer or employee of the United States government or the District of Columbia government having knowledge of violations of the Antideficiency Act:

—to administrative discipline for failing to report such violations within 30 days of obtaining such knowledge; and,

[5] See 31 U.S.C. § 3902(d) which provides that:

The temporary unavailability of funds to make timely payment due for property or services does not relieve the head of the agency from the obligation to pay interest penalties under this section.

The report of the Committee on Government Operations accompanying section 3902(d) states that it was proposed to explicitly codify our opinion (B-223857, Feb. 27, 1987), holding that where an agency was authorized to pay contracts from borrowed funds and the statutory ceiling on the agency's borrowing authority precluded the agency from borrowing the funds necessary to pay the contractors, interest accrued on the debt and a reportable violation of the Antideficiency Act occurred. H.R. Rep. No. 100-784, 20 (1988).

—to criminal penalties for knowingly and willfully failing to report such violations within 30 days of obtaining such knowledge.

Your letter further states that the Deputy IG's recommendation is a result of findings contained in a report by the Assistant Inspector General for Audit Policy and Oversight[6] that focuses on DOD's processing of potential/apparent Antideficiency Act violations. The IG report is based on identified potential/apparent violations of the Antideficiency Act that are required to be reported to the Assistant Secretary of Defense (Comptroller) by DOD Directive, 7200.1, enclosure 5 (May 7, 1984). The report discloses that some overobligations had not been reported to the ASD(C) as required by the directive, although the reasons for this are not given.

The report indicates that it has taken anywhere from 2 months to 7 years to process Antideficiency Act reports and to submit them to the President and Congress. The report indicates (1) that decentralization of the responsibility for processing (controlling, administering, and reporting) the Antideficiency Act violations within DOD resulted in inexperienced personnel regularly handling matters relating to the violations, and (2) that multi-layered administrative, legal, and investigative processing of violations, were the primary causes of the processing delays. The report recommends centralized processing of Antideficiency Act violations by trained personnel as a solution to DOD's problem. It also recommends developing guidelines for imposing administrative penalties on responsible oversight or management personnel who do not timely report Antideficiency Act violations that they are aware have occurred and to use the guidelines to assure consistent application of administrative penalties.

However, the report does not disclose any instances of undisclosed potential violations (*i.e.*, potential violations that had not been identified by internal audit controls although they may not have been reported to the ASD(C)). As to the failure to report to the ASD(C), the report does not attribute this to deliberate efforts to conceal violations. Additionally, the report does not disclose whether any potential violations were avoided altogether under the old account closing process.[7] Also, the report does not disclose whether any violations resulted in DOD requesting either additional funding or authority to use current appropriations to cover the overobligations. Finally, we have no information on whether other agencies are experiencing similar problems in processing Antideficiency Act violations or the length of time other agencies take to report a violation to the Congress and the President once they determine a violation has occurred.

While the IG's report does indicate that DOD has experienced problems in processing Antideficiency Act violations, it does not persuade us that enactment of the governmentwide criminal or administrative sanctions suggested by the Deputy IG will improve compliance with the act. Criminal and administrative

[6] Inspector General, Department of Defense, Survey Report on the Review of Processing of Violations of the Antideficiency Act, Rep. No. APO 91-015 (July 31, 1991).

[7] However, the report discloses one instance where a violation of the Antideficiency Act occurred in October 1983, was discovered in May 1986, was covered in June 1988 by using funds from the "M" account, and was reported to the President and the Congress in December 1989.

sanctions already are available for the knowing and willful failure to disclose Antideficiency Act violations under statutes already enacted. Further, the 1990 amendments to the account closing law reduces the likelihood that Antideficiency Act violations will go undisclosed.

Current Criminal Penalties for Nondisclosure

Knowing and willful violations of the Antideficiency Act prohibitions are Class E felonies by virtue of 18 U.S.C. § 3359(a)(1)(E) which provides that any offense punishable by a maximum term of imprisonment of less than 5 years but more than 1 year is a Class E felony. 31 U.S.C. §§ 1350, 1519, provide for imprisonment of up to 2 years for knowing and willful violation of the Antideficiency Act. By virtue of 18 U.S.C. § 4, concealment of the commission of a felony is itself a felony, punishable by a fine of not more than $500 or imprisonment of not more than 3 years, or both. See also: 18 U.S.C. § 2 making it an offense to aid another in the commission of a criminal offense; 18 U.S.C. § 3 making it an offense to assist an offender or to hinder his apprehension, trial, or punishment; and 18 U.S.C. § 371 making it an offense to conspire to commit an offense. Finally, in this regard, 18 U.S.C. § 1001 provides that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

We have held that where agencies are authorized to incur obligations in excess of appropriations available to pay the obligations, *i.e.*, where the agency has contract authority, the obligations should be recorded against the account even though payment may not take place until Congress provides supplemental or liquidating appropriations. 65 Comp. Gen. 4 (1985). In such circumstances the overobligation is not a violation of the Antideficiency Act. However, in our opinion, the distinction between an authorized and an unauthorized overobligation does not warrant a different treatment regarding the recording of obligations constituting violations of the Antideficiency Act. As we noted in our decision, it is the incurring of the obligation in excess of available appropriations and not the recording of the obligation that constitutes the violation of the Antideficiency Act. 65 Comp. Gen. at 9. In fact, we consider the failure to record an obligation for the purpose of concealing a violation of the Antideficiency Act a violation of 31 U.S.C. § 1501. Thus such overobligations should be recorded in the accounts.[8] However, merely recording the overobligation does not authorize its payment until budget authority is provided by Congress.

Applying the rationale of the above cited decision to the provisions of Title 18, U.S.C., discussed above, the knowing and willful failure to record an overobligation in an account in order to conceal a violation of the Antideficiency Act would be an offense under existing law. B-132900-O.M., Nov. 3, 1977. Further,

[8] Furthermore, this information is required to be contained in the President's budget. 31 U.S.C. § 1108(c).

the knowing and willful charging of an obligation to an improper account in order to conceal a violation of the Antideficiency Act would likewise be an offense under existing law. However, in order to make this explicit and resolve all doubts on this matter, consideration may be given to amending the obligation recording statute, 31 U.S.C. § 1501, by adding the following subsection:

(c) All obligations as defined in subsection (a) of this section shall be promptly recorded against the proper appropriation account.

Avoiding Antideficiency Act Violations Under Former Account Closing Law

Under the former account closing law, Antideficiency Act violations could be avoided altogether by delaying recognition of the overobligation until the obligations had reached the "M" accounts and the merged surplus authority was available to cover the overobligation. Once obligations were transferred to the "M" accounts and the unobligated balances were transferred to the merged surplus authority, they lost their fiscal year identity. Adjustments to obligations that would have violated the Antideficiency Act if recorded in the expired account prior to transfer would not be violations if recorded in the "M" account unless they exceeded the merged surplus authority or exceeded some independent legal limitation on costs.[9]

The reforms instituted by the 1990 amendments to the account closing law have eliminated this avenue for avoiding Antideficiency Act violations. Similarly, the agencies' ability to avoid the disclosure of overobligations by delaying the recognition of obligations is greatly diminished since at some point they must be paid. At that point they would be subject to disclosure through agency action or internal or external audits. Further, the 1990 amendments subject expired accounts to the same audit scrutiny that is given current appropriations. 31 U.S.C. § 1554(a). Thus, we do not think it is necessary to amend the law to require Antideficiency Act reports under the threat of criminal or administrative penalties since (1) the merged surplus is no longer available to cure overobligations in accounts and (2) agencies are required by law to provide the same degree of oversight to expired accounts that they provide to current accounts.

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[9] *See*, GAO, Strategic Bombers: B-1B Program's Use of Expired Appropriations (GAO/NSIAD-89-209, B-235114, September 5, 1989).